SUPREME COURT OF APPEALS OF VIRGINIA.

VICARS v. SALYER.

Sept. 15, 1910.

[68 S. E. 988.]

1. Statutes (§ 181*)—Construction—Legislative Intent.—The intention of the Legislature in enacting a statute as gathered from the words thereof or from the occasion and necessity of the law, where the words are not explicit, is the leading clue to the construction of the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

2. Statutes (§ 236*)—Remedial Statutes—Construction.—The court in construing a remedial statute should keep in mind the old law, the mischief to be remedied, and the remedy.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 317, 324, 325; Dec. Dig. § 236.*]

3. Lis Pendens (§ 24*)—Purchasers Pending Suit—Effect.—The rule as to the effect of a lis pendens is founded on its necessity to give effect to judicial proceedings, for, without it, the administration of justice might be frustrated by alienations of that which is the subject of the litigation, pending the suit, and the rule, in the absence of statute, applies even in cases in which there is a physical impossibility that the purchaser could know with any possible diligence of the existence of the pending suit.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. §§ 38-62; Dec. Dig. § 24.*]

4. Lis Pendens (§ 18*)—Recording—Indexing—Necessity.—Code 1904, § 3566, providing that no lis pendens shall affect a bona fide purchaser without actual notice unless a memorandum setting forth the description of the land, and the name of the person whose estate is intended to be affected by the suit "shall be left with the clerk of the court * * * who shall forthwith record the said memorandum in the deed book and index the same in the name of the person aforesaid," makes the recording of the memorandum and the indexing of it essential to the docketing of a lis pendens; the object of the statute being to provide a means by which one desiring to purchase land may by an examination of the deed books ascertain whether or not there is a pending suit which may affect the title.

[Ed. Note.—For other cases, see Lis Pendens, Dec. Dig. § 18.*]

5. Lis Pendens (§ 22*)—Bona Fide Purchaser—Notice.—The notice which will affect a purchaser pending a suit against his vendor

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

to set aside the conveyance to him must affect the conscience of the purchaser, and the notice may be either actual or circumstantial or presumptive, and it is not sufficient if it merely puts the purchaser on inquiry, but it must be clear and strong and such as to fix on him the imputation of bad faith in making the purchase.

[Ed. Note.—For other cases, see Lis Pendens, Dec. Dig. § 22.*]

Appeal from Circuit Court, Russell County.

Suit between one Vicars and one Salyer. From a decree for Salyer, Vicars appeals. Affirmed.

BUCHANAN, J. The appellee, Salyer, was a purchaser of land whilst a suit was pending to set aside a conveyance thereof (upon the ground that it was made to hinder and defraud the creditors of the grantor) and to subject the land to the payment of certain debts due from the grantor. Such proceedings were had in the cause as resulted in a sale of the land. The trial court held that the rights of the pendente lite purchaser were superior to those of the purchaser at the judicial sale. From that decree this appeal was taken.

The contention of the appellant is that the suit to subject the land was properly docketed under the provisions of section 3566 of the Code of 1904, or, if it were not, that the appellee had actual notice of the pendency of the suit when he purchased, and that the trial court therefore erred in holding his purchase valid.

The appellee, on the other hand, denies that the lis pendens was properly docketed, and also denies that he had actual notice of the pendency of the suit.

The ground upon which the appellee denies that the lis pendens was properly docketed is that it was not indexed as to the grantee in the deed sought to be set aside—the person from whom the appellee purchased.

The language of section 3566 of the Code is as follows: "No lis pendens, or attachment under chapter one hundred and forty-one, shall bind or affect a bona fide purchaser of real estate, for valuable consideration, without actual notice of such lis pendens or attachment, unless and until a memorandum setting forth the title of the cause, the general object thereof, the court in which it is pending, a description of the land, and the name of the person whose estate is intended to be affected thereby, shall be left with the clerk of the court of the county or corporation in which the land is situate, who shall forthwith record the said memorandum in the deed book, and index the same in the name of the person aforesaid."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

The question presented for our decision is whether "indexing" is a part and a necessary part of docketing of a lis pendens. In other words, is the docketing incomplete until the lis pendens is properly indexed in the name of the defendants, as provided by section 3566?

The meaning of that section is, of course, to be derived from the statute itself; but, as was said by Judge Moncure in Fox's Adm'r v. Commonwealth, 16 Grat. 1, 10: "In the exposition of a statute the leading clue to the construction to be made is the intention of the Legislature, and that may be discovered from different signs. As a primary rule, it is to be collected from the words. When the words are not explicit, it is to be gathered from the occasion and necessity of the law, being the causes which moved the Legislature to enact it."

Section 3566 being a remedial statute, in construing it there should be kept in mind the old law, the mischief intended to be remedied, and the remedy. Claflin & Co. v. Steenbock & Co., 18 Grat. 860, and authorities cited by Judge Joynes.

It is not explicitly or distinctly stated in section 3566 that indexing is necessary to complete the docketing of the lis pendens. Neither is it explicitly or distinctly stated that recording in the deed book the memorandum left with the clerk is necessary to complete the docketing. Yet, if the recording of the memorandum in the deed book is not essential to the docketing of the lis pendens, little good would be accomplished by the section—at least, the statute would fall far short of remedying the mischief which existed under the old law.

In Newman v. Chapman, 2 Rand. 93, 102-105, 14 Am. Dec. 766, the doctrine upon which lis pendens rests is clearly, and, as we understand it, correctly, stated by Judge Green. He says that: "The rule as to the effect of a lis pendens is founded upon the necessity of such a rule to give effect to the proceedings of courts of justice. Without it the administration of justice might, in all cases, be frustrated by successive alienations of the property which was the object of litigation, pending the suit, so that every judgment and decree would be rendered abortive where the recovery of specific property was the object. This necessity is so obvious that there was no occasion to resort to the presumption that the purchaser really had or by inquiry might have had notice of the pendency of the suit to justify the existence of the rule. In fact, it applied in cases in which there was a physical impossibility that the purchaser could know, with any possible diligence on his part, of the existence of the suit. * * *" After showing that the rule of lis pendens was less harsh as administered by courts of chancery than by the common law courts, he continues: "This principle, however necessary,

was harsh in its effects upon bona fide purchasers, and was confined in its operation to the extent of the policy on which it was founded. * * *"

Because of the hardship which frequently resulted from the enforcement of the rule, especially to bona fide purchasers, statutes have been passed in England and in many of the states of this country intended, as far as practicable, to remedy the mischiefs of the old law, or to lessen its hardships. One of the objects of the Legislature in enacting section 3566 manifestly was to provide a means by which a person desiring to purchase land might by an examination of the deed books in the county where the land was situated ascertain whether or not there was pending a suit which might affect the title to the land. This object could not be accomplished by the mere leaving of the memorandum required with the clerk. An examination of the deed books would disclose nothing in regard to the pending suit, unless, as the section provides, that memorandum was spread upon or recorded in the deed book. As before stated, if indexing the lis pendens after it has been spread upon on recorded in the deed book is not an essential part of its docketing, then copying the memorandum in the deed book is not, for the language of the section cannot be mandatory as to the one and merely directory as to the other. The provision of the statute is that the memorandum required "shall be left with the clerk of the court of the county or corporation in which the land is situate, who shall forthwith record the said memorandum in the deed book and index the same in the name of the person aforesaid."

The provisions of the section as to recording the memorandum in the proper deed book and indexing it being the same, both are essential to the complete docketing of a lis pendens or neither is. To hold that neither is, not only renders the index to the deed books an untrustworthy guide in the examination of a title, but renders the deed books themselves an untrustworthy guide and makes it necessary, if a purchaser would be safe, to have the clerk's office searched to see if a memorandum of a pending suit had been left with the clerk. Such a construction would not remedy the mischief of the old law and accomplish the manifest intention of the Legislature of making the deed books of the county show the state of the title to land so far as affected by pending suits. It seems to us that to require a purchaser to look to any other source of information than the deed books—that which the statute has provided for him—would be contrary to the spirit and policy if not the letter of the statute.

We are of opinion, therefore, that section 3566 would fail

to accomplish the purpose for which it was manifestly enacted, unless it be held that the recording of the memorandum in the deed book and indexing the same in the manner required by the section are necesary to the complete docketing of a lis pendens. The lis pendens relied on in this case not having been properly indexed, the title acquired by the appellee was not affected by the suit to set aside the deed to his grantor, unless he had actual notice of the pendency of that suit when he made the purchase.

The next question is: Did the appellee have such notice?

The notice which will affect a purchaser in a case of this kind must, as was said in McClanachan *v.* Siter, 2 Grat. 314, and which has been reiterated in numerous cases since that case was decided, "be such as to affect the conscience of the subsequent purchaser or incumbrancer. It may be either actual,—in other words, direct and positive—or it may be circumstantial or presumptive. But it is not sufficient if it merely puts the party upon inquiry. It must be clear and strong, and such as to fix upon him the imputation of mala fides."

Or, as stated by Prof. Minor, 2 Min. Inst. 887: "The effect of the notice which will charge a subsequent purchaser for valuable consideration, and exclude him from the protection of the registry law, is to attach to the purchaser the guilt of fraud. It is therefore never to be presumed, but must be proved and proved clearly. A mere suspicion of notice, even though it be a strong suspicion, will not suffice." See Vest *v.* Michie, 31 Grat. 149, 31 Am. Rep. 722; Arbuckle *v.* Gates & Brown, 95 Va. 802, 813, 30 S. E. 496; Hunton *v.* Wood, 101 Va. 54, 60, 43 S. E. 186, and cases cited.

Says 2 Minor on Real Property, § 1412, and his statement is fully sustained by the decided cases: "Notice is actual when the purchaser knows of the existence of the adverse claim, or perhaps where he is conscious of having the means of knowledge and yet does not use them; and it is immaterial whether his knowledge results from direct information or is gathered from facts and circumstances. The information must proceed, however, from some person interested, or otherwise likely to be well informed, or from some one who gives specific and definite statements—and that in the course of the treaty for the purchase. Vague reports or general assertions, especially from persons not interested in the property and who, therefore, may not be well informed, will not affect the purchaser's conscience. * * *"

Without discussing the evidence in detail, it is sufficient to say that it fails to make out a case of actual notice on the part of the appellee when he made his purchase.

We are of opinion that there is no error in the decree appealed from, and that it must be affirmed.

Affirmed.

Note.

In the principal case the court decides that under our statute "indexing" is a part and a necessary part of docketing of a lis pendens. It is difficult to see how any other conclusion could have been reached under a statute so clear. The statute expressly provides that the memorandum setting forth the title of the cause, the general object thereof, etc., shall be recorded by the clerk of the court in the deed book *and indexed* by him in the name of the person whose estate is intended to be affected thereby.

In 21 Encyc. Law, 2nd Ed., it is said: "It is not necessary to the commencement of the lis pendens that the notice of pendency or the pleadings be indexed or recorded, where the statutes only require filing, or where the duty to index or record is only ministerial. The indexing or recording, or both, of notices of pendency are, however, essential to the lis pendens under some statutes."

MARTZ, CLERK, *v.* ROCKINGHAM COUNTY.

Nov. 17, 1910.

[69 S. E. 321.]

1. Statutes (§ 190*)—Construction.—Where the language of a statute is ambiguous, the court in construing it will give that construction which will be the more reasonable and just; but the court must give effect to the plain language of a statute, however absurd the result may be, and leave it to the Legislature to make the proper changes.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 269; Dec. Dig. § 190.*]

2. Clerks of Courts (§ 24*)—Compensation—Statutes.—Act March 3, 1908 (Laws 1908, c. 130), requiring the clerk of the circuit court to make and certify copies of the list of persons who have paid the poll taxes, and providing that for copying and certifying the list he shall be allowed two cents for each ten words for the first copy, "and one-half cent for each ten words for all other copies required," when considered in the light of the history of the act, as originally enacted by Act March 10, 1904 (Laws 1904, c. 89 [Code 1904, § 86b]), and the compensation fixed for other officers for prescribed duties with reference to the poll list, gives to the clerk a half cent for

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